Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

(30) (23) (24)

Nos. 00-1751, 00-1777, and 00-1779

In the Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

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HANNA PERKINS SCHOOL, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

SENEL TAYLOR, ET AL., PETITIONERS

v.

DORIS SIMMONS-HARRIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

GREGORY G. GARRE
Assistant to the Solicitor General

ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

35 pp

QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment prevents a State from providing tuition aid as part of a general assistance program to the parents of children who attend failing public schools and authorizing the parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated.

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INTEREST OF THE UNITED STATES

The Ohio Pilot Project Scholarship Program provides tuition aid and other assistance to the parents of children in Cleveland, Ohio, where the inner-city public school system has been found to be seriously deficient. The program permits parents to use that aid to enroll their children in a private school of their own choosing, without regard to whether the school is religiously affiliated. The court of

appeals in this case held that the Ohio program violates the Establishment Clause of the First Amendment.

Congress has enacted several programs that make funds available to disadvantaged individuals to obtain services from private entities of their own choosing, irrespective of the religious affiliation, if any, of such entities. See, *e.g.*, Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9858n(2) (1994 & Supp. V 1999); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. 604a(a)(2)(B)(ii), (c), and (e)(1) (Supp. V 1999). In addition, Congress recently enacted a statute that extends certain tax benefits when parents use funds from an education individual retirement account to pay the expenses for their children to attend "a public, private, or religious" elementary or secondary school. Act of June 7, 2001, Pub. L. No. 107-16, § 401(c)(2), 115 Stat. 58.

More generally, the United States has a strong interest in ensuring that States and local governments are afforded the flexibility that the Constitution reserves to them to provide for the education of the Nation's youth. "[E]ducation is fundamental to the development of individual citizens and the progress of the Nation." 20 U.S.C. 5899(a)(2).

STATEMENT

1. More than 75,000 children, the vast majority of whom are from low-income and minority families, are enrolled in the Cleveland City School District. *Cleveland City School District Performance Audit* 1-4 (Mar. 1996) (*1996 Audit*). In 1995, a federal district court, in an ongoing proceeding involving the desegregation of Cleveland public schools, placed that school district under the control of the state superintendent because of a crisis that gravely affected the district's educational performance. See *Reed* v. *Rhodes*, No. 1:73 CV 1300 (N.D. Ohio Mar. 3, 1995); Pet. App. 43a. The Cleveland district failed to meet any of the 18 state standards for minimum acceptable performance, and students in the district

performed at a dismal rate compared with students in other Ohio public schools. See *1996 Audit* 2-3. Sixty percent or more of the students failed to graduate. 5 C.A. App. 1621.

In response to that educational crisis, Ohio enacted its Pilot Project Scholarship Program. Ohio Rev. Code Ann. (ORC) §§ 3313.974-3313.979 (Anderson 1999 & Supp. 2000). The program provides two basic kinds of assistance: tuition aid for students in kindergarten through eighth grade who reside in a covered district to attend a participating public or private school of their families' choosing, ORC § 3313.975(B) and (C)(1); and tutorial aid for "an equal number of students * * * attending public school in any such district," ORC § 3313.975(A). The program is limited to "school districts that are or have ever been under federal court order requiring supervision and operational management of the district by the state superintendent." *Ibid.* Only the Cleveland school district has met that criterion. Pet. App. 4a.[1]

Any private school located within the boundaries of a covered district, regardless of any religious affiliation it may have, is eligible to participate in the program, as long as it meets state educational standards, ORC § 3313.976(A)(3), and agrees not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion, ORC § 3313.976(A)(4) and (6). Any public school located in a school district adjacent to the covered district is also eligible to participate. ORC § 3313.976(C).

Tuition aid is disbursed through checks. When the aid is used to enable a student to attend a private school, checks are made payable to the student's parents, who endorse the checks over to their chosen school. ORC § 3313.979. In awarding such aid, families with incomes below 200% of the

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[1] The "Pet. App." references are to the appendix accompanying the petition in No. 00-1751.

poverty line are given priority. ORC § 3313.978(A); Pet. App. 4a. For those low-income families, the program pays 90% of the private school's tuition up to $2250. ORC § 3313.978(A) and (C)(1). Participating schools may not require a low-income family to pay more than the remaining 10% of the tuition. ORC § 3313.976(A)(8). For other families, the program pays 75% of the tuition up to $1875, and there is no tuition cap. ORC §§ 3313.976(A)(8), 3313.978(A).

Parents are responsible for choosing a participating school. ORC § 3313.978(A). Schools that choose to participate are required to admit pilot project students in accordance with criteria established by the State and the nondiscrimination principle. ORC § 3313.976. In the 1999-2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland elected to participate. That same year, 3700 students participated in the scholarship program, most of whom (96%) enrolled in a religiously affiliated school. Pet. App. 5a.[2] There is no evidence that any student who has applied to a nonreligious private school in the program has been denied admission. *Id.* at 51a.

The program also authorizes tutorial assistance for students whose parents choose to keep them in public school. ORC § 3313.978(B). Students from low-income families receive 90% of the amount charged for such assistance (up to $360), and other students receive 75% of that amount. ORC § 3313.978(B) and (C)(3). Tutorial aid grants are made "payable to the parents of the student," then endorsed to the service provider. ORC § 3313.979. The number of tutorial assistance grants offered to families who choose to keep their children in a covered public school must equal the

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[2] That percentage has fluctuated. At one point, "as many as 22% of the students enrolled in the program attended nonreligious [private] schools." Pet. App. 5a.

number of tuition scholarships for families who choose to send their children to a private school. ORC § 3313.975(A).

The pilot scholarship program is part of a broader undertaking by the State to enhance the education available to Ohio children, especially those in underperforming public schools. That undertaking includes programs governing community and magnet schools. Community schools are established and funded pursuant to state law, but are run by their own school boards and exist independent of public school districts. ORC §§ 3314.01(B), 3314.04; J.A. 157a-164a. During the 1999-2000 school year, there were 10 start-up community schools in Cleveland, with more than 1900 students. J.A. 161a. Magnet schools are public schools operated by the school district itself that emphasize a particular subject area, teaching method, or service to students. 4 C.A. App. 1304. During the 1999-2000 school year, there were 23 magnet schools in Cleveland, with more than 13,000 students in grades kindergarten through eighth. J.A. 151a-152a; Pet. App. 117a n.15.

2. In 1996, respondents in No. 00-1751 challenged the Ohio program in state court on federal and state grounds. The Ohio Supreme Court held that the program does not violate the Establishment Clause of the First Amendment. *Simmons-Harris* v. *Goff*, 711 N.E.2d 203, 211 (1999). The court emphasized that whatever link between government and religion is created by the program "is indirect, depending only on the 'genuinely independent and private choices' of individual parents, who act for themselves and their children, not for the government." *Id.* at 209 (quoting *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986)). The court found, however, that the program violated the "one-subject" requirement of the Ohio constitution because it was enacted as part of a bill addressing many subjects. *Id.* at 214-215. The State cured that legislative defect, while leaving the basic provisions discussed above intact.

3. In July 1999, respondents filed this action in federal district court, seeking to enjoin the program as reenacted on the ground that it violates the Establishment Clause. Petitioners in No. 00-1777 intervened to defend the program, and a second suit was filed against the program. The district court consolidated the actions and issued a preliminary injunction barring implementation of the program. Pet. App. 7a-8a, 128a-132a. After the court of appeals declined to stay that order, this Court granted a stay pending appeal. 528 U.S. 983 (1999). In December 1999, the district court granted summary judgment for respondents and permanently enjoined implementation of the program (Pet. App. 61a-126a), finding that it was unconstitutional under *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), discussed at pages 26-28, *infra*.

4. The Sixth Circuit affirmed. Pet. App. 1a-58a. The court of appeals acknowledged that the pilot program is "facial[ly] neutral[]," but held that it has an impermissible "effect" of advancing religion. Pet. App. 25a. The court pointed to the fact "that 82% of participating schools are sectarian," and was of the view that "the tuition restrictions * * * limit the ability of [private] nonsectarian schools to participate." *Id.* at 25a-26a. The court also attached significance to the fact that no adjacent public school had chosen to participate in the program. *Id.* at 26a. The court declined to consider the "other options available to Cleveland parents such as the Community schools," stating that those options are "at best irrelevant" to this case. *Id.* at 23a.

The court of appeals rejected the State's reliance on decisions such as *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Witters*; and *Mueller* v. *Allen*, 463 U.S. 388 (1983), in which this Court upheld facially neutral school-aid programs that provided an indirect benefit to religious schools only as a result of the private choices of individual aid recipients. The court reasoned that, unlike the programs in those cases, "the Ohio scholarship

program is designed in a manner calculated to attract religious institutions and chooses the beneficiaries of aid by non-neutral criteria." Pet. App. 29a. Instead, the court equated the Ohio program with the one invalidated in *Nyquist*, and held that *Nyquist* "governs." *Id.* at 24a-25a.

Judge Ryan dissented. Pet. App. 34a-58a. He concluded that the "statute interpreted in *Nyquist* and the Ohio statute before us are totally different in all of their essential respects." *Id.* at 34a; see *id.* at 36a-40a. In addition, he reasoned that the "Establishment Clause decisions handed down in the 27 years since *Nyquist* was decided" (*id.* at 35a) underscore that "whether public funds find their way to a religious school is of no constitutional consequence if they get there as a result of genuinely private choice." *Id.* at 41a; see *id.* at 40a-43a. Judge Ryan was of the view that the record in this case demonstrates that the Ohio pilot program affords participants such "a *genuine* choice," *id.* at 45a; see *id.* at 44a-46a, and he thus rejected the proposition that the Ohio program has a forbidden effect.

SUMMARY OF ARGUMENT

In response to the catastrophic and well-documented failure of Cleveland's inner-city public schools, the State of Ohio enacted a pilot scholarship program to provide children in that community an opportunity to avoid the debilitating, life-long consequences of a failed education. The court of appeals erred in concluding that the Establishment Clause of the First Amendment prohibits that program.

The Establishment Clause prevents a State from enacting laws that have the purpose or primary effect of advancing religion. No one disputes that the Ohio program was enacted for the valid and, indeed, compelling secular purpose of providing educational assistance to Ohio children who find themselves in a demonstrably failing public school system. The crux of this case, therefore, is whether the Ohio program nonetheless has the forbidden effect of advancing

religion. In undertaking that inquiry, this Court looks primarily to whether a law results in government indoctrination of religion, or defines aid recipients by reference to religion. *Agostini* v. *Felton*, 521 U.S. 203 (1997). When neither is true, a reasonable observer would be unlikely to draw an inference that the State has endorsed religion by enacting the law.

The determination whether government aid that may benefit religious schools results in government indoctrination turns on "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action." *Mitchell* v. *Helms*, 530 U.S. 793, 809 (2000) (plurality). When aid is provided on neutral terms without regard to religion, it is unlikely that a reasonable observer would conclude that *the State* is engaged in indoctrination. The Court has consistently upheld educational assistance programs under which aid may benefit religious schools as a result only of the genuinely independent and private choices of aid recipients. That is true even if, as a result of those choices, such aid directly assists the educational function of religious schools. *E.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

The Ohio pilot scholarship program fits comfortably within that framework. Aid recipients are defined by whether they reside in a failing public school district, not by reference to religion. The only way in which aid may reach religious schools is as a result of truly private choices by parents to enroll their children in such a school. Aid recipients have the full opportunity to expend the aid on a wholly secular education, including by using tuition aid to enroll their children in a participating private nonreligious school, keeping their children in public school and seeking tutorial aid, or forgoing participation in the scholarship program altogether and, instead, sending their children to a magnet or com-

munity school. Parental choice, not government indoctrination, is therefore the hallmark of the Ohio program.

The fact that most parents who have participated in the program have opted to use scholarship aid to send their children to a private religious school does not mean that any indoctrination that occurs in such a school may be attributed to the State. This Court already has rejected that line of argument in upholding private-choice programs. *E.g.*, *Agostini*; *Mueller* v. *Allen*, 463 U.S. 388 (1983). For several reasons, it should do the same here. First, even though most participating private schools are religiously oriented, in the 1999-2000 school year 10 of 56 were not. Second, the record establishes that the decisions of individual parents to enroll their children in a private religious school, rather than another school, have been freely made. Third, when considered in the context of the full range of options available to the parents of children in the Cleveland school district, including magnet and community schools, the percentage of parents who have elected to use scholarship aid to send their child to a private religious school is small.

Nor is there any basis to conclude that the Ohio pilot program discourages either private nonreligious or adjacent public schools from participating. Nothing in the record shows that any private nonreligious or adjacent public school has declined to participate in the program because it cannot afford to do so. The fact that more private religious than nonreligious schools participate does not support the court of appeals' "financial disincentive" theory, because, as is true nationwide, there are more private religious than nonreligious schools in Cleveland to begin with.

Committee for Public Education and Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973), does not govern this case. First, whereas the program in *Nyquist* was intended to support private schools statewide, the purpose of the Ohio program is to assist children in a failing public school district, and the program is carefully tailored to that purpose.

Second, unlike the program in *Nyquist*, the Ohio program also provides assistance for parents who choose to keep their children in public school. Moreover, this Court's Establishment Clause jurisprudence has undergone "significant[]" changes since *Nyquist*, particularly in "the criteria used to assess whether aid to religion has an impermissible effect." *Agostini*, 521 U.S. at 223, 237. Today, *Nyquist* must be read in light of those changes.

ARGUMENT

THE OHIO PILOT SCHOLARSHIP PROGRAM DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion." This Court has often been called upon to decide whether a government program that may result in an indirect benefit to religious schools is barred by the Establishment Clause. In undertaking that inquiry, the Court looks, *first*, to "whether the government acted with the purpose of advancing or inhibiting religion," and *second*, to "whether the aid has the 'effect' of advancing or inhibiting religion." *Agostini* v. *Felton*, 521 U.S. 203, 221-223 (1997); see *Mitchell* v. *Helms*, 530 U.S. 793, 807-808 (2000) (plurality); see *id.* at 844-845 (O'Connor, J., joined by Breyer, J., concurring in the judgment). Applying that framework, the Court has consistently upheld government aid to education that is provided to individuals on neutral terms without regard to religion, and that may reach a religious school only as a result of the truly private choices of individual parents or students. As explained below, the Ohio pilot scholarship program comports with those principles, and is not barred by the Establishment Clause.

A. The Pilot Scholarship Program Was Enacted To Promote A Valid Secular Purpose

No one disputes that the scholarship program at issue in this case has a valid secular purpose. The program was enacted in response to a severe educational crisis in Cleveland's inner-city schools, in an effort to rescue Ohio school children in communities where educational assistance is most sorely needed. See pp. 2-3, *supra*; Pet. App. 44a (Ryan, J., dissenting) ("The *sole* purpose of the voucher program is to save Cleveland's mostly poor, mostly minority, public school children from the devastating consequences of * * * the failed Cleveland Schools.").

This Court has recognized that "[a]n educated populace is essential to the political and economic health of any community, and [that] a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated." *Mueller* v. *Allen*, 463 U.S. 388, 395 (1983). The purpose of the Ohio pilot scholarship program is even more focused and, indeed, more compelling. The program is limited to public school districts that are or have been subject to a federal court order placing them under direct state supervision. ORC § 3313.975(A). The Cleveland school district is the only district that has qualified for the program. Pet. App. 4a; J.A. 69a. The need to assist children enrolled in that district has not abated. See 2 C.A. App. 475 (1999 report); 5 C.A. App. 1621 (1999 graduation rate below 33%).

Nor is it surprising, or in any way improper, that the State would choose to give the parents of students enrolled in a demonstrably failed school district the option of using aid to send their children to a private school, including a religiously affiliated school, if they so desire. Private schools have long played an important role in the educational life of American communities. See *Board of Educ.* v. *Allen*, 392

U.S. 236, 247-248 (1968). Where a public school system has failed, it is common sense for a State, in addition to trying to revive that system, to look to private schools as a means of creating educational opportunity for children in the community. And in addressing such a critical problem, it is appropriate for a State to be inclusive, and make *all* schools eligible to participate in some way in the overall effort, irrespective of their particular educational philosophy or mission. Cf. *Good News Club* v. *Milford Central School*, 121 S. Ct. 2093, 2100 (2001); *Rosenberger* v. *Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

B. The Pilot Scholarship Program Does Not Have An Impermissible Effect Of Advancing Religion

The Ohio pilot scholarship program also satisfies the "effects" prong of this Court's Establishment Clause jurisprudence.

1. "For a law to have forbidden 'effects' [under the Establishment Clause], it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 337 (1987). In *Agostini*, 521 U.S. at 234, this Court explained that it looks to "three primary criteria" in determining whether a school-aid program has such effects: whether the aid "result[s] in governmental indoctrination"; whether the aid "define[s] its recipients by reference to religion"; and whether the aid creates an "excessive entanglement" between government and religion. See *Mitchell*, 530 U.S. at 808 (plurality); *id.* at 845 (O'Connor, J.).

a. "[W]hether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to government action." *Mitchell*, 530 U.S. at 809 (plurality); see *id.* at 842 (O'Connor, J.); *Agostini*, 521 U.S. at 226. "In distinguishing

between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality); see *id.* at 838 (O'Connor, J.) ("[W]e have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid."); *Good News Club*, 121 S. Ct. at 2104 ("We have held that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* toward religion.'") (citing cases).

As a general rule, indoctrination cannot reasonably be attributed to the government itself when "any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Mitchell*, 530 U.S. at 810 (plurality) (quoting *Agostini*, 521 U.S. at 226); see *id.* at 842-843 (O'Connor, J.). That is true even if, as a result of those choices, the aid in turn "directly assists the educational function of religious schools." *Agostini*, 521 U.S. at 225-226; *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 487 (1986). In a related vein, when aid may reach a religious school only in that fashion, it is unlikely that a reasonable observer of the program would believe that "the State itself is endorsing a religious practice or belief." *Mitchell*, 530 U.S. at 843 (O'Connor, J.); see *id.* at 835 (plurality); *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring); *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment).

The Court recognized the significance of the element of private choice in evaluating the school-aid program challenged in its first modern Establishment Clause case, *Everson* v. *Board of Educ. of the Township of Ewing*, 330 U.S. 1, 18 (1947), where the Court upheld a state program permitting localities to reimburse parents for expenses incurred in transporting their children to school, even if they chose to

send them to a religious school. And since *Everson*, that principle has become deeply ingrained in this Court's Establishment Clause precedents. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), for example, the Court held that government funds could be used to pay for the services of a sign-language interpreter to assist a deaf child enrolled in a religious school, where the funds were made available to a broad class of individuals on neutral terms, without regard to whether the school was public or private, religious or nonreligious. As the Court explained, "[b]y according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

Similarly, in *Witters*, the Court upheld a state program that provided funds to disabled individuals to obtain vocational assistance, even where the funds were in turn used by the recipient to enroll in a religious school. As the Court explained, "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." 474 U.S. at 487. And, in *Mueller*, the Court upheld a state law permitting parents to deduct educational expenses from their state income tax, without regard to whether the parents sent their children to a public or private, or religious or nonreligious, school. The Court explained that "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." 463 U.S. at 399 (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981)). See also *Agostini*, 521 U.S. at 228-229 (Title I program, under which federal funds are distributed to public agencies that provide services directly to low-income students "no matter where they choose to attend school," is analogous to program upheld in *Zobrest*).

b. The second criterion identified in *Agostini* for identifying impermissible effects—whether the aid program defines its recipients by reference to religion—is "closely related to the first." *Mitchell*, 530 U.S. at 813 (plurality). "[T]he manner in which a government-aid program identifies its recipients is important because 'the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination.'" *Id.* at 845 (O'Connor, J.) (quoting *Agostini*, 521 U.S. at 231). The Court has recognized, however, that no such "incentive" is present when "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Agostini*, 521 U.S. at 231. Accordingly, the second *Agostini* criterion is likely to be met, the Court has explained, whenever aid is provided "to *all* eligible children regardless of where they attended school." *Ibid.* (citing, *e.g.*, *Zobrest*, *Witters*, and *Mueller*).[3]

2. a. The Ohio pilot scholarship program fits comfortably within the *Agostini* framework. To take the second consideration first, the Ohio program does not "define its recipients by reference to religion." *Agostini*, 521 U.S. at 234. Both tuition aid and tutorial assistance are made available to participating families on neutral terms that in no way refer to religion. The family of any student in a pilot district

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[3] The third *Agostini* criterion—"excessive entanglement" between government and religion—typically exists only when "pervasive monitoring by public authorities" would be necessary to ensure that a program does not involve government inculcation of religion. 521 U.S. at 233. As is true with respect to the other *Agostini* criteria, it is unlikely that there would be any occasion for such monitoring or that such entanglement would be present when aid may flow to religious entities only as the result of the intervening and truly private decisions of aid recipients. In this case, respondents have not seriously challenged the Ohio program under the third *Agostini* criterion, and the court of appeals did not discuss (or rely on) that factor in invalidating the program.

through eighth grade is eligible to participate. ORC § 3313.976(A). The only preference under the program is for low-income families. *Ibid.* All private schools within a pilot district, as well as all public schools in adjacent districts, are eligible to participate as long as they agree to abide by the non-discrimination principle and meet state education standards. ORC § 3313.976(A). "The statute expresses no preference, explicitly or implicitly, either as to the religion of the voucher recipients, or if the recipient chooses a private school, whether the voucher is applied to a religious or nonreligious school." Pet. App. 47a (Ryan, J., dissenting).

Nor does the Ohio pilot program "result in governmental indoctrination." *Agostini*, 521 U.S. at 234. "Each scholarship or grant to be used for payments to a registered private school or to an approved tutorial assistance provider is payable to the *parents* of the student entitled to the scholarship or grant." ORC § 3313.979 (emphasis added); see *Witters*, 474 U.S. at 487. Those funds may reach a private religious school only as a result of the private and wholly independent decision of parents to enroll their children in such a school, rather than to avail themselves of one of the other options available to them under Ohio law.

At the same time, "aid recipients have full opportunity to expend [the] aid on wholly secular education." *Witters*, 474 U.S. at 488. A number of nonreligious private schools participate in the program, and "there is no evidence that any of [those schools] have *ever* rejected a single voucher applicant for any reason." Pet. App. 51a (Ryan, J., dissenting). Nor is there any "evidence in the record that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." *Id.* at 51a-52a.

The parents of children in the Cleveland school district have other options as well. They may leave their children in public school and seek the tutorial aid that the pilot scholar-

ship program makes available. Or they may forgo assistance under the scholarship program and enroll their children in a magnet or community school, free of charge. See Pet. App. 45a-46a (Ryan, J., dissenting); 4 C.A. App. 1303-1304. The community school system in particular promotes a range of alternatives to the schools operated by the Cleveland school district itself, in addition to local private schools. Indeed, in instituting the community school program, the State recognized that such schools would "provid[e] parents a choice of academic environments for their children and provid[e] the education community with the opportunity to establish limited experimental programs in a deregulated setting." J.A. 42a.[4]

b. The pilot scholarship program thus shares the key features of the educational assistance programs in *Zobrest* and *Witters*. Ohio has singled out a narrow and particularly needy class of citizens for assistance—mostly low-income children in grades kindergarten through eighth who find themselves in a demonstrably unsuccessful educational environment. Only a small fraction (less than 4.5%) of students in the State qualify for that aid, and because there are only about 3700 spaces in the scholarship program, an even smaller percentage (less than 0.3%) of students statewide actually benefit from it. The aid is made available on neutral terms to the parents of students participating in the program. And "[a]ny aid provided under [the] program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487.

The private-choice program challenged in this case is on even more solid footing than the one upheld in *Mitchell*.

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[4] The parents also would be free to use the scholarship aid to send their children to an adjacent public school participating in the program, although no adjacent public school district thus far has elected to participate.

Mitchell involved a "per-capita-school-aid program," as distinguished from the "true private-choice programs considered in *Witters* and *Zobrest*." 530 U.S. at 842-843 (O'Connor, J.). Under the program in *Mitchell*, funds were granted to local agencies, which then provided educational assistance directly to public and private schools, including religious schools. The amount of the assistance provided to each school was determined by its enrollment. As the *Mitchell* plurality observed, under such a program, "[i]t is the students and their parents—not the government—who, through their choice of school, determine who receives [the] funds." *Id.* at 830. In the view of the concurring Justices in *Mitchell*, such "a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools." *Id.* at 842-843. Those Justices nonetheless concluded that the per-capita-aid program was constitutional. This case, by contrast, involves the "true private-choice" type of program. *Ibid.*

c. For similar reasons, the pilot scholarship program "cannot reasonably be viewed as an endorsement of religion." *Agostini*, 521 U.S. at 235; see *Witters*, 474 U.S. at 489. "[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, '[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.'" *Mitchell*, 530 U.S. at 843 (O'Connor, J.). That is particularly true with respect to the assistance program challenged in this case. It is undisputed that the program was enacted to throw an educational lifeline to the mostly poor students in Cleveland's public school district after the district had demonstrably failed parents and students in its basic educational mission. Cf. *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995)

(O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment) (A reasonable observer must be deemed to be aware of the "history and context" underlying the program.). The background and targeted focus of the Ohio program thus furnish an extra measure of protection against any inference that the State itself is endorsing religion.

So does the program's experimental nature. In *Bowen* v. *Kendrick*, 487 U.S. 589, 603-604 (1988), for example, this Court concluded that Congress's decision to amend the Adolescent Family Life Act to allow "religious organizations," along with other groups, to provide publicly funded counseling on problems associated with teenage sexuality promoted "the entirely appropriate aim of increasing broad-based community involvement" in addressing those problems, as well as ensuring "increased participation of parents in education and support services, * * * increas[ing] the flexibility of the programs, and * * * spark[ing] the development of new, innovative services." Similarly here, Ohio and the Cleveland school district have taken a number of steps, including the creation of community and magnet schools and the provision of tutorial assistance to public school children, to address the plight of Cleveland's school children. Any objective observer familiar with the situation would reasonably view the pilot scholarship program as one part of a broader undertaking to offer those children a full range of educational opportunities through the combined efforts and innovations of public schools, private schools, community groups, and parents.

C. The Court Of Appeals' "Effects" Analysis Is Out Of Step With This Court's Precedents And Is Not Supported By The Record In This Case

The court of appeals concluded that the Ohio pilot scholarship program has an impermissible effect of advancing religion. The court pointed to the percentage of private

religious schools participating in the program, the supposedly "lower tuition needs" of religious schools, and the fact that (at least so far) no neighboring public school district has chosen to participate in the program. Pet. App. 26a. That reasoning is both legally and factually unsound.

1. This Court has repeatedly held that a general assistance, private-choice program does not have an impermissible effect of advancing religion simply because, in practice, more—even significantly more—beneficiaries of the program choose to obtain services from a religious rather than nonreligious entity. For example, in *Mueller*, this Court rejected the argument that a state law providing an income tax deduction for educational expenses had an impermissible effect because "the bulk"—more than 90%—"of deductions taken [under the program] will be claimed by parents of children in sectarian schools." 463 U.S. at 401. The Court explained that it "would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Ibid.*[5]

Similarly, in *Agostini*, the Court upheld the use of federal funds to send public school teachers into private schools to provide remedial education to disadvantaged children, even though more than 90% of the private schools within the

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[5] That reluctance is called for here. The experience in Cleveland and other localities that have experimented with expanding the educational options available to disadvantaged children in faltering public schools indicates that the number of individuals and types of schools participating in such programs can fluctuate from year to year based on the dynamics of the particular range of options and other factors, including litigation. See J.A. 227a, 234a-236a; note 2, *supra*. Milwaukee, for example, "has seen dynamic growth in the number of nonsectarian schools participating" in its school-choice program, which, like the Ohio program at issue in this case, was established by Wisconsin to create opportunities for the mostly low-income and minority families with children in that community's failing public school system. J.A. 236a.

jurisdiction of the school board at issue were religious. 521 U.S. at 210. In so ruling, the Court emphasized that it was not "willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229. See also *Good News Club*, 121 S. Ct. at 2107 n.9; *Mitchell*, 530 U.S. at 812 n.6 (plurality) (*Agostini* "held that the proportion of aid benefitting students at religious schools pursuant to a neutral program involving private choices was irrelevant to the [Establishment Clause] inquiry."); *Witters*, 474 U.S. at 491-492 & n.3 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring); *Jackson* v. *Benson*, 578 N.W.2d 602, 619 n.17 (Wis.), cert. denied, 525 U.S. 997 (1998).

To be sure, a State may not contrive a program to benefit one religion over another, or religion over nonreligion. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994). Nor may a State utilize facially neutral terms to advance an impermissible purpose of singling out religion for unfavorable treatment. *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993). But when, as here, the government establishes a neutral program for a concededly valid purpose, and when any aid provided by that program may benefit religion only as a result of the private choices of individual aid recipients, then the *manner* in which individuals exercise that choice does not itself furnish a basis for invalidating the program. See *Agostini*, 521 U.S. at 229; *Mueller*, 463 U.S. at 401. Several facets of the program in this case bolster that conclusion here.

First, as discussed above, parents participating in the pilot scholarship program have the option of using aid to send their children to a private nonreligious school. Although the number has fluctuated, in the 1999-2000 school year 10 private nonreligious schools (representing virtually all of such schools in the Cleveland area) participated in the pilot program. Pet. App. 5a.

Second, there is no evidence establishing that parents who chose to enroll their children in a participating private religious school did so because of any financial incentive created by the program, or any feeling that they lacked a secular alternative. To the contrary, the numerous affidavits in the record establish that parents who opted to use scholarship funds to send their children to a private religious school did so primarily because of the school's educational record, safety, and diversity, or because of the feeling of trust that they had after meeting with teachers or administrators. See, *e.g.*, 00-1777 Pet. App. 80a, 88a, 90a, 97a, 99a, 127a, 141a, 154a, 173a, 175a, 183a, 185a; 3 C.A. App. 657; see also J.A. 69a-71a, 100a-101a. That evidence underscores that the individual choices made under the program were thoughtfully and *freely* made by parents fulfilling their "high duty" to provide for the education of their children. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); see *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-233 (1972).

Third, the court of appeals' focus on the relative percentages of religious and nonreligious private schools participating in the program unduly discounts the entire range of options available to parents. As discussed above, parents have several options in addition to the pilot scholarship program. In fact, the vast majority of parents eligible for the scholarship program who have transferred their children out of one of Cleveland's regular public schools have enrolled them in a magnet or community school. See J.A. 207a, 217a; see also J.A. 168a-169a; 5 C.A. App. 1635-1645, 1657-1670 (affidavits of parents indicating that they consider all options, including magnet and community schools, in deciding whether to participate in pilot scholarship program).

The court of appeals dismissed those options as "at best irrelevant" because they were not enacted as part of the pilot scholarship program itself. Pet. App. 23a. That analysis is fundamentally mistaken. The community schools, for example, broaden the universe of nonreligious schools

that are available to Cleveland school children outside the Cleveland public school system. Some private nonreligious schools within the Cleveland district—which could have participated in the pilot scholarship program—have become community schools. J.A. 145a-146a, 217a-218a. In addition, Ohio has established a single "office of school options" to "provide services that facilitate the management of the community schools and the pilot scholarship program," ORC § 3314.11, underscoring the interrelationship between such choice programs. In determining whether the pilot scholarship program has an impermissible effect of advancing religion, there is no reason to ignore the full range of choices provided by the State to the program's beneficiaries, only *one* of which is for parents to accept scholarship aid and enroll their children in a private religious school.

2. The court of appeals' belief that the pilot program discourages participation of private nonreligious schools also does not withstand scrutiny. Citing only a law review article, the court broadly asserted that "religious schools often have lower overhead costs, supplemental income from private donations, and consequently lower tuition needs." Pet. App. 26a. From that premise, the court reasoned that the program's tuition cap (ORC § 3313.976(A)(8)) creates a financial disincentive for private nonreligious schools to accept pilot program students. Pet. App. 26a. That conclusion simply has no support in the record. As Judge Ryan explained, "there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason, including a supposed inability to afford the differential between the value of a $2,500 voucher and the actual cost of a nonreligious, private school." *Id.* at 51a.

The determination whether a challenged government program violates the Establishment Clause often "depends on the hard task of judging—sifting through the details and determining whether the challenged program offends the

Establishment Clause. Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case." *Mitchell*, 530 U.S. at 844 (O'Connor, J.) (quoting *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring)). In undertaking that sensitive task, however, this Court has never suggested that a federal court may invalidate a state law under the First Amendment based on asserted "facts," with no actual foundation in the record before it. The court of appeals erred in doing so here.

In any event, the court of appeals' "financial disincentive" theory is contradicted by the fact that, as the record establishes, several nonreligious private schools in the Cleveland area *do* participate in the pilot program. Pet. App. 5a. The fact that more private religious than nonreligious schools participate in the program does not support the court of appeals' speculation that the program discourages the participation of nonreligious schools. As is true across America, most private schools in the Cleveland area are religiously affiliated to begin with. See Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., *Private School Universe Survey: 1999-2000*, at 2 (2001) (about 78% of private schools nationwide are religiously affiliated).

The court of appeals' speculation that the tuition cap might create a disincentive for schools to accept students also ignores its unquestionably valid purposes. The cap makes it more likely that low-income families will be able to send their children to a participating private school, whether it is religious or nonreligious. It also encourages private schools that ordinarily charge a higher tuition (and have a student base that can afford such tuition) to do their part to help educate Cleveland's neediest students. The cap applies only to low-income scholarship students. Private schools, both religious and nonreligious, remain free to charge whatever tuition they choose with respect to all their other students—including any pilot scholarship students who are not from low-income families.

3. The court of appeals' reliance (Pet. App. 26a) on the fact that no adjacent public school has elected to participate in the pilot program is similarly flawed. "There is absolutely no evidence in the record to support the majority's argument that the Ohio statute creates a financial 'disincentive' for Cleveland's neighboring, suburban public school districts to participate in the program." *Id.* at 50a (Ryan, J., dissenting); see *id.* at 51a. In fact, the program creates the opposite incentive. As the State has explained, neighboring public schools that elect to participate in the pilot program and accept scholarship students "would receive an *additional* $2,250 in state funding, because scholarship students would be included in each suburban school district's total number of students * * * for purposes of calculating the amount of state funds the district receives." 00-1751 Pet. 15-16 n.2; see ORC § 3317.02(*l*). Even with that financial incentive, however, there are several reasons why suburban public school districts might decline to participate in the pilot scholarship program, including overcrowding in their own schools.

Moreover, even though no adjacent public school has participated in the pilot scholarship program to date, parents eligible to receive scholarships have other public school options available to them. They may keep their children in their current public school and apply for tutorial aid. As discussed above, the program requires that tutorial assistance grants be made available for families who choose to keep their children enrolled in public school in equal number to the tuition scholarships for families who choose to send their children to a participating private school. ORC § 3313.975(A); J.A. 166a. In addition, parents may transfer their children to a public magnet or community school, as thousands of Cleveland parents have done. See p. 22, *supra*.[6]

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[6] The court of appeals concluded that the "Ohio scholarship program is designed in a manner *calculated* to attract religious institutions." Pet. App. 29a (emphasis added). As discussed above, that conclusion is not

D. The Court Of Appeals' Reliance On *Nyquist* Was Misplaced

The court of appeals erred in concluding that this case is "govern[ed]" by this Court's decision in *Nyquist*. Pet. App. 24a. In fact, the significant differences between the program challenged in this case and the one in *Nyquist* only underscore that Ohio has not engaged in an establishment of religion by enacting its pilot scholarship program.

1. *Nyquist* involved a challenge to a New York program that provided direct grants to private schools across the State for maintenance and repair costs, as well as tuition reimbursement and state income tax deductions for parents of children in those schools, the "great majority" of which were religious. 413 U.S. at 783. Findings established that the program was intended to provide financial support to the State's private schools, and thereby prevent a "massive increase in public school enrollment and costs." *Id.* at 765. This Court held that the program had the impermissible "effect" of advancing religion. *Id.* at 780. The Court rejected the argument that the tuition-reimbursement and tax-deduction provisions were valid because they provided benefits to parents, who chose where to enroll their children, finding that those provisions "fare[d] no better under the 'effect' test" than the program's direct grants. *Id.* at 785.

The Ohio program in this case differs in important respects from the New York program in *Nyquist*. First, the overriding purpose of the program in *Nyquist* was to

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supported by the record. Moreover, it conflicts with the undisputed fact that the program has a valid secular purpose. In that regard, this case is nothing like *Lukumi Babalu Aye*—which the court of appeals cited (*id.* at 25a)—where the record "compel[led]" the conclusion that the locality had acted with the improper object of singling out religion for unfavorable treatment. 508 U.S. at 534; see *id.* at 534-538. To the extent that the court of appeals' "effects" analysis is rooted in an inclination on its part to believe that the State acted with an improper purpose, the court's analysis fails for that reason alone.

support *private schools* in New York *en masse*, in response to their deteriorating condition and the resulting pressures on public schools. 413 U.S. at 764-765, 773, 783. Indeed, the program included direct aid to those schools, *id.* at 780-782 & n.38, and the Court concluded that the tuition-assistance grants were "offered as an incentive for parents to send their children to sectarian schools," *id.* at 786. The purpose of the Ohio program, in contrast, is to assist individual students in failing public school districts. Currently fewer than 60 private schools and only a tiny fraction of school children in Ohio participate in the program. The program in this case is focused on the needs of children where schools are failing, not on supporting private schools, as in *Nyquist*.

Second, the overall Ohio program in this case, unlike the New York program in *Nyquist*, also provides options to parents who choose to keep their children in public schools. Ohio guarantees funding for an equal number of grants to such parents to enable their children to receive tutoring, ORC § 3313.975(A), encourages participation of adjacent public school districts in the scholarship program, and funds magnet and community schools that offer innovative alternatives to the regular schools operated by the Cleveland public school system. See pp. 3-5, *supra*.

In *Nyquist*, this Court expressly reserved judgment on the constitutionality of a program "involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 783 n.38 (citation omitted). It was not necessary to address that question in *Nyquist* because the only possible beneficiaries of the New York tuition reimbursement program were the parents of children who attended private schools. By contrast, the Ohio program in this case provides assistance *both* to parents who elect to enroll their children in a private school *and* to parents who elect to keep them in public school. That difference, especially when coupled with the

manifest differences in the purpose and scope of the two programs, distinguishes this case from *Nyquist*.[7]

2. Moreover, *Nyquist* must be read in light of this Court's subsequent decisions. As this Court recognized in *Agostini*, the Court's Establishment Clause jurisprudence has undergone "significant[]" changes over the past two decades, particularly in "the criteria used to assess whether aid to religion has an impermissible effect." 521 U.S. at 223, 237; see *Mitchell*, 530 U.S. at 845 (O'Connor, J.). Since *Nyquist*, this Court has repeatedly upheld government programs that offer aid "to a broad range of groups or persons without regard to their religion." *Mitchell*, 530 U.S. at 809 (plurality). And, "[a]s a way of assuring neutrality, [the Court has] repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.* at 810 (quoting *Agostini*, 521 U.S. at 226); see *id.* at 841-843 (O'Connor, J.); pp. 12-14, *supra*.

In *Mueller*, the dissenters argued that *Nyquist* "established that a State may not support religious education either through direct grants to parochial schools or through financial aid to parents of parochial school students." 463 U.S. at 404. Indeed, they argued that "the Minnesota statute [in *Mueller*] ha[d] an even greater tendency to promote religious education than the New York statute struck down in *Nyquist*, since the percentage of private schools that are nonsectarian is far greater in New York than in Minnesota."

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[7] Nothing in *Nyquist* suggests that in order to survive an Establishment Clause challenge a State must *compel* public school participation in a program that provides assistance to the families of students who attend private schools. Nor would there be any doctrinal foundation for such a rule. Nonetheless, under the program in *Nyquist*, public schools were not even authorized to participate (or benefit), whereas under the Ohio program in this case they indisputably are. That distinction makes it less likely that the State may be viewed as endorsing religion by enacting the type of pilot scholarship program at issue here.

Id. at 409 n.3. The Court rejected that analysis, and held that the Minnesota program did not have an impermissible effect. Instead, the Court explained that, "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no 'imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (citation omitted).[8]

Since *Mueller*, that-private-choice principle has become deeply embedded in this Court's Establishment Clause jurisprudence. See, *e.g.*, *Witters*, 474 U.S. at 487; *Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 226; *Mitchell*, 530 U.S. at 811 (plurality); *id.* at 842-843 (O'Connor, J.). *Nyquist* must be read today in light of that evolution of this Court's Establishment Clause jurisprudence. Because of the significant differences between the Ohio pilot program in this case and the New York program invalidated in *Nyquist*, there is no need for the Court to reconsider the holding in *Nyquist*. But if the Court disagrees, it should hold in this case that, to the extent that *Nyquist* extends to the type of private-choice program in this case, *Nyquist* has been overtaken by this Court's subsequent decisions.

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"The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer*, 262 U.S. at 400 (citing Northwest Territory Ordinance of 1787, ch. 8, Art. III, 1 Stat. 52). The pilot scholarship program challenged in this case was enacted for the commendable, and indisputably secular, purpose of providing the children of

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[8] In distinguishing *Nyquist*, the *Mueller* Court also noted that the educational assistance program in *Nyquist* benefitted only the parents of students enrolled in private schools, whereas the program in *Mueller* benefitted the parents of students in private as well as public schools. See 463 U.S. at 398. As discussed above, the program here has the same broad scope as the one in *Mueller*.

predominantly low-income families in Cleveland's failing public school district with an opportunity to obtain the same level of education available to children elsewhere in the State who benefit from greater educational opportunities. The court of appeals erred in invalidating that program on the ground that it establishes religion in violation of the First Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GREGORY G. GARRE
Assistant to the Solicitor General
ROBERT M. LOEB
LOWELL V. STURGILL JR.
Attorneys

NOVEMBER 2001